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No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1932

GULF STATES STEEL COMPANY AND NATIONAL SURETY COMPANY, PETITIONERS

v.

THE UNITED STATES

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court for the Northern District of Alabama rendered no opinion. The opinion of the Circuit Court of Appeals (R. 109–115) is reported in 56 F. (2d) 43.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 19, 1932. (R. 119–120.) The petition for a writ of certiorari was filed March 23, 1932, and was granted April 25, 1932. (R. 123.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a decision by the Board of Tax Appeals that the collection of income taxes was barred by the statute of limitations extinguishes liability upon a bond given in renewal of a bond delivered upon filing a claim for abatement of such taxes before the statute of limitations expired and conditioned upon the payment of so much of the tax as was not abated.

STATUTES INVOLVED

The statutes involved are contained in Appendix A, *infra*, pp. 24–28.

STATEMENT

This action was brought by the respondent against the petitioners as principal and surety on a bond given September 9, 1925, to the Collector of Internal Revenue for the District of Alabama in connection with a claim made by the Gulf States Steel Company (hereafter called the taxpayer) for the abatement of an additional assessment of income and excess profits taxes for 1917. The District Court sustained demurrers to a portion of the pleas of the petitioners (R. 29–30), issue was joined on the remaining pleas, and the case was tried before a jury and resulted in a verdict for the respondent. There is no dispute about the facts, which may be summarized as follows:

The taxpayer filed its income and profits tax return for 1917 on March 28, 1918, and on June 25,

1918, paid the tax shown, $989,790.57. (R. 2–3, 24–25, 26–27, 31.) Upon examination of the return the Commissioner of Internal Revenue determined and assessed an additional tax of $153,815.30. The additional assessment appeared on the April, 1921, list. (R. 31–33.)

On May 6, 1921, the taxpayer filed a claim for abatement of the additional assessment of $153,815.30, in which it made certain contentions relative to the computation of invested capital by the Commissioner and with respect to the deduction allowed by the Commissioner in determining income subject to the excess-profits tax. (R. 34–36.)

On March 13, 1923 (fifteen days before collection of the additional tax would have been barred by the five-year period of limitations under Section 250 (d) of the Revenue Act of 1921, *infra*, p. 24), the claim for abatement had not been acted upon and the Collector of Internal Revenue was demanding payment of the tax. (R. 3, 13, 25, 26.) To secure a delay pending consideration of the claim, the taxpayer, as principal, and the American Surety Company, as surety, delivered their bond for $175,350 to the collector on March 13, 1923. (R. 12–13.) The condition of the bond was as follows (R. 13):

> The condition of the above obligation is such that, if the said Gulf States Steel Company will indemnify the said W. E. Snead as Collector as aforesaid, or his successor in office, against all loss, cost, damage, and ex-

> pense to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector, of the sum of One Hundred and Fifty-three Thousand Eight Hundred Fifteen and 30/100 Dollars ($153,815.30), claimed of it under the War Revenue Act of 1917, pending the filing, by the said Gulf States Steel Company of additional facts and information in support of a claim for the abatement of said amount heretofore filed by it, then this obligation to be null and void, otherwise, to be and remain in full force and effect.

On April 3, 1925, while the claim for abatement was still undetermined, in order to secure the release of the American Surety Company as surety upon the bond of March 13, 1923, the taxpayer executed another bond, pledging $200,000 in Government bonds as security for the performance of its obligation. (R. 15–16.) The condition of this bond was as follows (R. 13–14):

> The condition of the above obligation is such that, whereas the Gulf States Steel Company did execute a bond in the penal sum of One Hundred Seventy-five Thousand Three Hundred and Fifty Dollars ($175,350.00), and in favor of W. E. Snead, Collector of Internal Revenue for the District of Alabama, which said bond was signed by the American Surety Company of New York, as surety, under date of the 13th day of March, 1923, and was given in support of a

> claim for the abatement of assessments, penalties, and interests, under the Revenue Act of 1917. Being desirous of relieving the above bound surety Company and further securing the payment of any amount found to be due the United States government under the above Revenue Act, now, therefore, if the undersigned Gulf States Steel Company shall pay to W. E. Snead, Collector, or his successors in office, such amount of the claim as is not abated, together with all costs, damages, penalties, interest, or other expense connected therewith, then this obligation shall be void, otherwise it shall remain in full force and effect.

On September 9, 1925, the claim for abatement still not having been acted upon, the taxpayer, as principal, and the petitioner National Surety Company, as surety, executed the bond which is sued upon in this action. The condition of this bond was as follows (R. 18–19):

> The condition of the above obligation is such that, whereas, an additional income tax has been assessed for the year 1917 in the sum of One Hundred Fifty-three Thousand Eight Hundred and Fifteen Dollars and Thirty Cents ($153,815.30), with penalty and interest against the Gulf States Steel Company of Birmingham, Alabama. A claim for the abatement of the additional tax was filed with the Collector of Internal Revenue for the District of Alabama at

> Birmingham. On the third day of April, 1925, the Gulf States Steel Company did execute its bond securing the payment of so much of the additional assessment, penalties, and interest as is not abated. In lieu of surety on the above bond the said company did deposit with the Federal Reserve Bank of New York, under Section 1029 of the Revenue Act of 1924, the following-described United States, Fourth Liberty Loan 4¼% Gold Bonds of 1933–8 series, being of the par value of $200,000.00 (coupons), numbers * * *. The above bonds were deposited on account and subject to the orders of W. E. Snead, Collector of Internal Revenue for the District of Alabama. Now, therefore, if W. E. Snead, Collector of Internal Revenue, shall release and surrender the said bonds to the said Company, and the principal, or sureties, either or both, shall pay to the said Collector so much of the amount of the claim as is not abated, together with penalties and interest thereon as provided by Law, then this obligation shall be of no effect. Otherwise it shall remain in full force.

On December 4, 1925, the Commissioner notified the taxpayer of the finding of a liability in excess of that previously assessed, that its claim for abatement would be rejected, and that the Collector would be notified of this adjustment within thirty days unless during that period evidence should be furnished showing its incorrectness. (R. 37–38.)

On May 12, 1926, the Commissioner advised the taxpayer that it was proposed to reject the claim in its entirety and that, in accordance with the provisions of Section 283 (e) or (k) of the Revenue Act of 1926 (*infra,* pp. 26–27), he was given sixty days within which to file an appeal with the Board of Tax Appeals. (R. 39–40.)

On July 11, 1930, the Collector notified the taxpayer and the National Surety Company of the action of the Commissioner in rejecting the claim, of the credits applied against the assessment by reason of overpayments for other years, and of a balance due of $132,795.57, with interest at 6 per cent from April 2, 1921, to the extent of the $200,000 secured by the bond. (R. 11, 31.) Upon their refusal to pay, this suit for $200,000 with interest from July 11, 1930, was instituted against the taxpayer and the National Surety Company on August 25, 1930. (R. 1.)

To the Government's complaint each of the petitioners filed a separate plea, which denied generally the allegations of the complaint and specially pleaded a decision of the Board of Tax Appeals as constituting an abatement of the tax. (R. 24–26, 26–28.) From these special pleas and also from the evidence contained in the bill of exceptions (R. 41 *et seq.*) it appears that on July 9, 1926, the Company petitioned the Board of Tax Appeals for a review of the decision of the Commissioner rejecting the claim for abatement. (R. 91.) On

March 4, 1927, an amended petition was filed which for the first time pleaded the statute of limitations as a bar to the collection of the tax. (R. 76–83.) After a hearing the Board held that the collection of the tax was barred by the statute of limitations and that there was for this reason no deficiency for the year 1917. (R. 45–46, 56, 58, 59, 62–66; 12 B. T. A. 1244.) A petition for review of this decision of the Board was filed in the court below by the Commissioner on April 9, 1929. (R. 51.) This petition was dismissed on motion of the Commissioner on December 9, 1929 (R. 45), after the decision of this court in *United States* v. *John Barth Co.*, 279 U. S. 370. The Board's decision thereupon became final.

To that part of the petitioners' plea setting up the decision of the Board of Tax Appeals the Government filed demurrers. (R. 28–29.) These demurrers were sustained (R. 29–30), issue was joined on the remainder of the petitioners' pleas, the case was tried before a jury, a verdict was returned for the Government, and judgment was entered accordingly (R. 29–30). Upon appeal the Circuit Court of Appeals affirmed the judgment, one judge dissenting. (R. 109–119.)

SUMMARY OF ARGUMENT

I

This case is governed in principle by the decision in *United States* v. *John Barth Co.*, 279 U. S. 370. In that case this Court held that the statute

of limitations relating to suits or proceedings for the collection of taxes did not bar a suit brought on a bond executed prior to the running of the statute, and binding the taxpayer and its surety to pay "any part of such tax found by the Commissioner to be due." The bond involved in this case, when properly interpreted in the light of the two earlier bonds which it succeeded, should be given the same effect as the bond before this Court in the *Barth* case.

Under the decision of this Court in the *Barth* case, it is plain that liability under the first bond was not affected by the running of the statute against the collection of the taxes *qua* taxes. There is nothing in the two later bonds to indicate an intention of the parties to change the situation. The fact that the third bond, upon which the present suit is based, was given after the statutory period for collection of the tax had expired, does not distinguish this case from the *Barth* case. For the third bond was but the ultimate instrument in a continuous series which had its origin before the expiration of the statutory period.

II

The decision of the Board of Tax Appeals that the taxpayer's liability for the tax as a tax was barred by the statute of limitations does not affect the petitioners' liability on the bond. The decision of the Board that collection of the tax was barred

affords no basis of distinction from the *Barth* case, where it appeared that collection of the tax was barred. Although the Board in form decided that there was no deficiency in tax, in substance it decided only that the liability for additional taxes was no longer enforcible as such. The Board's decision did not have the effect of abating the tax within the meaning of the bonds given in this case.

Nor was the decision of the Board a final determination of the present controversy which could only be reviewed on direct appeal from the Board's decision. The Board had no jurisdiction to determine the liability on the bond, and it expressly stated in its opinion that its decision "in no wise disposes of any question arising as to the liability on the bond." The question whether the giving of the bond operated as a waiver to extend the period for collection of the tax as such (which was decided by the Board) is not the same as the question whether this suit on the bond can be maintained.

ARGUMENT

I

THIS CASE IS CONTROLLED BY THE DECISION IN UNITED STATES *v.* JOHN BARTH CO., 279 U. S. 370

We believe that this case is governed in principle by the decision of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370.[1] In that case the

[1] Other cases to the same effect are *Gray Motor Co.* v. *United States*, 16 F. (2d) 367 (C. C. A. 5th); *United States* v. *Onken Bros. Co.*, 23 F. (2d) 367 (D. Wyo.); *United*

Barth Company, in consideration of the United States refraining from the collection of taxes outstanding against the company for 1918 pending a decision on certain claims for abatement, executed and delivered to the Commissioner of Internal Revenue a surety bond, which bound it and its surety to pay "on notice and demand by the Collector * * * any part of such tax found by the Commissioner to be due." At the time claims for abatement were filed and the bond was given the statute of limitations had not run against the collection of the taxes. The Commissioner considered the claims for abatement but allowed them only in part. The Barth Company and its surety were notified and payment under the bond of the taxes as determined was demanded. When payment was refused, the United States instituted suit on the bond. The Barth Company and its surety demurred to the Government's petition on the ground that the action was not commenced within the time prescribed by the provisions of certain statutes of limitations relating to suits or proceedings for the collection of taxes. This Court held that these statutes did not apply, saying (pp. 375, 376):

> The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded

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States v. *Rennolds*, 27 F. (2d) 902 (S. D. N. Y.). See also *Roberts Sash & Door Co.* v. *United States*, 282 U. S. 812, affirming 69 C. Cls. 363.

> to bar the suit can not be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. If there is any limitation applicable to a suit on the bond, it is conceded that it has not yet become effective. * * * To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

Bonds, like other contracts, are to be construed in the light of surrounding circumstances,[2] and we be-

[2] *Hill* v. *American Surety Co.*, 200 U. S. 197; *Bort* v. *E. H. McCutchen & Co.*, 157 Fed. 182 (C. C. A. 8th); *Richardson* v. *County of Steuben*, 226 N. Y. 13; *Caldwell* v. *United States Fidelity & Guaranty Co.*, 205 Ala. 463; *Southwestern Surety Ins. Co.* v. *United States Fidelity & Guaranty Co.*, 75 Okla. 232; *Missouri, Kansas & Texas Ry. Co.* v. *American Surety Co. of New York*, 291 Mo. 92. The purpose of the bond is to be considered (*Ryan* v. *United States*, 19 Wall. 514; *Grafton* v. *Fidelity & Guaranty Co.*, 227 N. Y. 162) and the court may depart from the letter of the condition of the

lieve that the bond involved in this case, when properly interpreted in the light of the two earlier bonds which it succeeded, can not be distinguished from the bond before this Court in the *Barth* case.

In the present case, at the time the claim for abatement was filed and the first bond was given, the statute of limitations, although about to run against the collection of additional taxes, had not yet run. On its face the bond shows clearly that the intention of the parties was to save the Government from any loss which might result from the delay occasioned by the permission given the company to present additional information in support of its claim for abatement.[8]

At the time this first bond was given (March 13, 1923) the Board of Tax Appeals had not been created. It is therefore evident that the parties then contemplated that liability on the bond should depend only upon the determination by the Com-

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bond to carry into effect the intention of the parties. *Cooke v. Graham's Administrator*, 3 Cranch, 228.

[8] The form of the condition in this first bond was to indemnify the Collector for any loss, cost, damage, and expense which he might incur as the result of allowing the taxpayer to withhold the payment of $153,815.30 taxes due. But under Section 3218 of the Revised Statutes (U. S. C., Title 26, Sec. 147), the Collector was personally responsible for the collection of the tax, and the promise was thus in substance one to pay the tax found due. There was no material difference between the condition of the first bond and that of the second, which secured "the payment of any amount found to be due the United States government." (R. 14.)

missioner of Internal Revenue on the claim for abatement.

The second bond executed by the petitioner referred both to the first bond and to the claim for abatement. It recited expressly that it was for the purpose of relieving the surety on the first bond of its obligation thereunder. But to continue the protection to the Government, it also provided that it was executed for the further purpose of "securing the payment of any amount found to be due the United States Government under the above Revenue Act," and also made provision for the deposit by the company as a pledge, in a Federal Reserve bank, of $200,000 in Government bonds.

The third bond, the one upon which suit was brought, while not mentioning the first bond, did refer to the second bond as well as the claim for abatement, and it showed that the primary purpose for which it was given was to obtain the surrender of the Government bonds which the company had deposited under the second bond, substituting therefor the obligation of a surety. The condition of both the second and third bonds was that the principal should pay "so much of the claim as is not abated."

Under the decision of this Court in the *Barth* case, *supra*, it is plain that liability under the first bond was not affected by the running of the statute against the collection of the taxes *qua* taxes. There is nothing in the two later bonds to indicate an in-

tent of the parties to change the situation. It is plain that the first bond was given for the purpose of delaying the collection of taxes asserted against the taxpayer and that the second and third bonds were but continuations of the first, and had no purpose but to change the security given the United States in support of the taxpayer's obligation. The language of this Court in the *Barth* case seems to apply directly to this case (279 U. S. at 376):

> The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

The fact that the third bond, upon which the present suit is based, was given after the statutory period for collection of the tax had expired does not distinguish this case from the *Barth* case.[4] For the third bond was but the ultimate instrument in a continuous series which had its origin

[4] Recovery on a bond given after the statutory period has expired has been allowed. *United States* v. *E. Hoyshire, Son & Co.*, 37 F. (2d) 720 (E. D. Va.). See also *Mascot Oil Co.* v. *United States*, 42 F. (2d) 309, affirmed, 282 U. S. 434, recognizing the principle that a moral obligation to pay a valid debt in the form of a tax is a sufficient legal consideration for a subsequent new promise to pay the tax either before or after the bar has become complete. This is the generally accepted rule as to all debts. *Campbell* v. *Holt*, 115 U. S. 620; 1 Williston, Contracts, Secs. 160–198. But in *United States* v. *Charleston Lead Works*, 49 F. (2d) 281 (E. D. S. C.), recovery was denied.

before the expiration of the statutory period. Nor is it material that the present surety on the bond did not become a party to the bond until after the statutory period for the collection of the tax had expired. For the surety's liability is measured by that of its principal, the taxpayer, and the taxpayer's liability has existed continuously since the execution of the first bond.[6]

II

THE DECISION OF THE BOARD OF TAX APPEALS THAT THE TAXPAYER'S LIABILITY FOR THE TAX AS A TAX IS BARRED BY THE STATUTE OF LIMITATIONS DOES NOT AFFECT THE PETITIONERS' LIABILITY ON THE BOND

The petitioners' chief defense to this action on the bond is based on the fact that the Board of Tax Appeals has determined that the tax can not be collected because of the statute of limitations. We believe that this defense is without merit, since the very purpose of the first bond and of the two which succeeded it was to guarantee the payment of taxes

[6] The modern cases are practically uniform in holding that the rule of strict construction of the obligation of a surety does not apply to compensated surety companies. *Maryland Casualty Co.* v. *Fowler*, 31 F. (2d) 881 (C. C. A. 4th); *United States* v. *Pawling & Co.*, 297 Fed. 65 (C. C. A. 3rd); *National Surety Co.* v. *McCormick*, 268 Fed. 185 (C. C. A. 7th); *City of Topeka* v. *Federal Union Surety Co.*, 213 Fed. 958 (C. C. A. 8th); *United States* v. *Lynch*, 192 Fed. 364 (D. Del.); *Royal Indemnity Co.* v. *Northern Ohio G. & S. Co.*, 100 Ohio St. 373. See also *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416. Most of the decisions cited hold that the obligation of such sureties, like insurance contracts, are to be construed most strongly against the surety. See *American Surety Co.* v. *Pauly*, 170 U. S. 133.

due the United States, even if the statute of limitations against their collection as taxes should run.

When the first bond was given, the Board of Tax Appeals had not been created, and the first bond, and those which followed it, must accordingly be construed with this fact in mind. Since the Board did not exist, the parties could not have intended that liability on the bond should depend upon any action which the Board might take. This argument applies to the second and third bonds as well as to the first, since their language discloses plainly that the purpose of all was the same.

The court below held that after the creation of the Board, liability upon the bond might depend upon the action of the Board in reviewing the Commissioner's rejection of the claim on the merits. This is equivalent to holding that the condition of the bond was that the principal and surety would pay the amount of the tax which was not abated as the result of a decision on the merits of the claim. But in the present case the taxpayer did not obtain a decision from the Board on the merits of its case. By relying upon the statute of limitations as a defense before the Board, the taxpayer voluntarily surrendered its right to have the Board pass upon the merits of the tax and thus left the decision of the Commissioner as the final decision on the merits.

It is plain that the parties did not intend the obligation of these bonds to pay "so much of the amount of the claim as is not abated" to be construed as merely an obligation to pay such amount

as the Board found could be collected within the statute of limitations. Such an obligation would have been worthless since collection of the tax as a tax was already barred at the time the second and third bonds were given. The only reasonable construction of the bond in suit is that it required the principal and the surety to pay the amount of tax found due as the result of a decision on the merits of the claim.

The decision of the Board that collection of the tax was barred is certainly no better defense than the *fact* that collection of the tax was barred in the *Barth* case. As the District Judge concluded in the present case (R. 110; see Appendix B, *infra*, pp. 29–30): "The finding of the Board that limitation had run added nothing to the fact that it had."

In urging that the Board's decision constitutes a bar to this action, the petitioners rely upon the provision in Section 906 (e) of the Revenue Act of 1926, as amended by Section 601 of the Revenue Act of 1928 (*infra*, p. 28) that the decision of the Board to the effect that the assessment or collection of a tax is barred by the statute of limitations shall be considered as its decision that there is no deficiency in respect of such tax. This question was recently considered by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Martin Hotel Co.*, 59 F. (2d) 549, now pending on petition for certiorari, No. 254, October Term, 1932, where the court said (p. 552):

Had the Board of Tax Appeals determined that, upon the merits, there were no deficiencies in corporate income taxes for the year 1919, there might be some substantial basis for holding that its decision must, under the terms of the escrow agreement, be regarded as the final determination of the Commissioner, and that therefore the certification by the Collector did not fix the taxpayers' liability or the obligation of the bank under the escrow agreement, regardless of the fact that the agreement provided that such certification was to be final. Considering, however, the substance of what was decided by the Board, and disregarding mere form, the action of the Board constitutes nothing more than a finding that the liability of the taxpayers for additional taxes for 1919, as determined by the Commissioner, was no longer enforceable as such. It did not disturb the determination of the Commissioner as to the amount of additional taxes which were due and unpaid for the year 1919, and the payment of which was secured by the deposit. It is our opinion that the Commissioner's determination, certified to the bank by the collector of internal revenue, must stand as fixing the liability of the taxpayer under the provisions of the escrow agreement, and that the decision of the Board of Tax Appeals had no effect upon the right of the government to have recourse against the deposit in the hands of the bank.

Although the condition of the agreement in the *Martin Hotel Co.* case was in substance that the

amount deposited in escrow should be held until the Commissioner finally determined the additional taxes due, we do not think that this difference renders the court's conclusion as to the effect of the Board's decision inapplicable to the case at bar. The court there held that the mere form of the Board's decision should be disregarded and that in substance all that happened was that the Board found the liability for additional taxes was no longer enforcible as such. The same reasoning applies here.[6] The Board's decision did not have the effect of abating the tax within the meaning of the bond given in this case any more than it had the effect of finally determining the tax to be due within the meaning of the *Martin Hotel Co.* case.

The petitioners also lay stress on the fact that the condition of the bond sued on is similar to that provided for bonds given in connection with jeopardy assessments under Section 279 (a) of the Revenue Act of 1924 (*infra*, p. 24); Section 279 (f) of the Revenue Act of 1926 (*infra*, p. 26); and Section 273 (f) of the Revenue Act of 1928 (*infra*, p. 28). It is pointed out that these sections recognize as abating the tax the decision of the Board that there is no deficiency. It is suggested that if

[6] In the court below petitioners relied upon the decision of the District Court in the case of *United States* v. *Martin Hotel Co.*, 52 F. (2d) 161, which was reversed by the Circuit Court of Appeals for the Eighth Circuit. The petitioners are not in a position to claim that the case is not in point because it was reversed in the Circuit Court of Appeals and is cited against them.

the decision of the Circuit Court of Appeals is permitted to stand, taxpayers who have furnished bonds in accordance with the requirements of these provisions will be denied the benefit of the statute of limitations, irrespective of whether or not the statute ran before the bonds were given. This was the view of Judge Sibley in his dissenting opinion in the court below.

The language of the condition of the bond in this case is not the same as the language of the condition of bonds given under Section 273 (f) of the Revenue Act of 1928 and the corresponding provisions of previous Revenue Acts. Under the latter the bond is "conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final." In the bond in suit the obligation is to pay "so much of the amount of the claim as is not abated."

In view of this difference in language, we do not think it is necessary for this Court to consider what would be the result if the bond had been given under Section 273 (f) of the Revenue Act of 1928 or similar provisions of earlier statutes. Of course, the petitioners do not suggest that the bond in suit was such a bond. The assessment was made long before the Board was created, and the third bond was given September 9, 1925, while it was not until May 12, 1926, that the Commissioner notified the taxpayer of the rejection of the claim and advised him of his right to appeal from this rejection to the Board.

Finally, it is argued by the petitioners that the Board held that the bond was not a waiver of the statute and that that decision could only be reviewed on appeal. It is urged that the decision of the Board has become final (since the Commissioner's appeal has been dismissed) and that it is not subject to collateral attack in this suit.

But the Board in its opinion (R. 66) expressly recognized that its decision "in no wise disposes of any question arising as to liability on the bond." The question whether the giving of the bond operated as a waiver to extend the period for collection of the tax as such is not the same as the question whether this suit on the bond can be maintained.

The Board had no jurisdiction to pass upon the right of the Commissioner to recover on the bond. Its jurisdiction was limited to a review of the Commissioner's determination of a deficiency in tax. The taxpayer's petition and amended petition to the Board sought "a redetermination of the deficiency." (R. 91–96, 78–83.) Not a word was said about a redetermination of any question of liability of a contractual character. In the amended petition it was for the first time contended (R. 81–82; Par. d–1) that the statute of limitations was effective to prevent a collection of the deficiency which the Commissioner had proposed—not that the statute had run when the tax was assessed or when the contractual liability with respect to it was assumed.

The Board's decision was no broader than the taxpayer's petition. It decided not that the right

to collect on the bond was barred, but that the right to collect the tax was barred. Under the decision of this Court in the *Barth* case, *supra*, it is plain that these two rights are not equivalent. See also *United States* v. *Whited & Wheless, Ltd.*, 246 U. S. 552.

It is plain, therefore, that the contention that the Government is seeking to subject the Board's decision to an improper collateral attack in this proceeding is without foundation. There is no basis for the application of a principle akin to *res judicata*, since (a) the parties in the two proceedings are not the same, (b) the Board had no jurisdiction to determine the liability on the bond, and (c) the Board expressly stated that its decision did not consider the question of liability on the bond.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

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OCTOBER, 1932.

APPENDIX A

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits, or war profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax Acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 300:

> SEC. 279. (a) If a deficiency has been assessed under subdivision (d) of section 274, the taxpayer, within 10 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or

of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim. (U. S. C., Title 26, Sec. 1063.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 56, 60, 64, 65:

SEC. 274. (b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment. (U. S. C., Sup. V, Title 26, Sec. 1048 (a).)

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount, or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing. (U. S. C., Sup. V, Title 26, Sec. 1048 (c).)

SEC. 279. (f) When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in subdivision (j) of this section. (U. S. C., Sup. V, Title 26, Sec. 1051.)

SEC. 283. (e) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be

collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section. (U. S. C., Sup. V, Title 26, Sec. 1064.)

* * * * *

(k) Where before the enactment of this Act a jeopardy assessment has been made under subdivision (d) of section 274 of the Revenue Act of 1924 (whether of a deficiency in the tax imposed by Title II of such Act or of a deficiency in an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section) all proceedings after the enactment of this Act shall be the same as under the Revenue Act of 1924 as amended by this Act, except that— (U. S. C., Sup. V, Title 26, Sec. 1064.)

* * * * *

SEC. 284. (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except— (U. S. C., Sup. V, Title 26, Sec. 1065.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 855:

SEC. 273. (f) *Bond to stay collection.*—When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment, may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as provided in section 297. (U. S. C., Sup. V, Title 26, Sec. 2273.)

SEC. 601. BOARD OF TAX APPEALS—PROCEDURE

Sections 906 and 907 (a) and (b) of the Revenue Act of 1924, as amended, are further amended to read as follows:

* * * * *

(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax. (U. S. C., Sup. V, Title 26, Sec. 1217.)

APPENDIX B

APRIL 20, 1931.

Hon. AUGUSTUS BENNERS,
Attorney for Defendant.

Hon. JIM C. SMITH,
United States Attorney.

GENTLEMEN: Referring to the case of the *United States* v. *Gulf States Steel Company*, I think the *Barth* case controlling in favor of the plaintiff. In the instant case the bond sued on was given before the statute of limitations had been run against the collection of the tax. In the *Barth* case the Supreme Court held that "the limitations of Sec. 250 (d) has no application to a situation following a claim of abatement and the giving of a bond." The Court also said: "The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay sought." The condition of the bond was: "If the principal or sureties, either or both, shall pay to said collector so much of the amount of the claim as is not abated, etc." In view of the Barth case, I do not think the claim was abated by a determination of the Board of Tax Appeals that the statute of limitations had run against the collection of the tax, by distraint or suit. If so construed, it would be inconsistent with the holding of the *Barth* case that one purpose of giving the

bond was "to prevent the running of time against the government." It would not do that if the limitations applied directly or indirectly through the determination of the Board of Tax Appeals as well to a suit on the bond as to the collection of the tax. The *Barth* case also holds that an action on the bond is a substituted remedy to the collection of the tax by suit or distraint and that the limitation applicable to a suit on the bond, if any, and not that applicable to the collection of the tax, is the appropriate one.

Entertaining this view, I think the United States is entitled to a judgment.

If the defendant has any remedy it would be based upon a redetermination by the Board of Tax Appeals on the merits and not upon a finding that there was no deficiency for 1917 tax because the statute of limitations had barred its collection.

I will sign an appropriate order when presented.

Respectfully,

W. I. GRUBB,
District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1932